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No. 95-1168

In The
Supreme Court of the United States
October Term, 1995

THE BOARD OF THE COUNTY COMMISSIONERS OF BRYAN COUNTY, OKLAHOMA,

Petitioner,

v.

JILL BROWN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether compliance with state law minimum requirements for hiring (and training) police officers insulates a municipality from § 1983 liability even when a jury reasonably decides that a municipal policymaker's particular hiring and training decisions were so inadequate as to amount to deliberate indifference to citizens' constitutional rights?

2. Whether, as a matter of law, to establish municipal liability under § 1983, a plaintiff must establish at least two deliberately indifferent hiring decisions (or two deliberately indifferent training decisions) by a municipal policymaker, before she can recover for the particular constitutional deprivation she suffered as a direct result of official municipal deliberate indifference?

3. Whether, as a matter of law, a § 1983 plaintiff must demonstrate prior incidents of police excessive force, even when unnecessary to establish that a deliberately indifferent official action taken by the municipality itself directly caused her particular constitutional injury?

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STATEMENT OF THE CASE

Bryan County's Statement of Facts reads as if the jury had resolved all contested fact issues in its favor. The verdict in favor of Jill Brown, however, indicates that the jury simply did not accept Petitioner's version of the traffic incident, or its position that the hiring and training of Stacy Burns was adequate in light of the duties he was assigned.

Throughout its Brief, Bryan County consistently understates the volume of evidence showing that it acted with deliberate indifference when its undisputed official policymaker on matters of hiring and training police officers,[1] Sheriff B.J. Moore, decided to employ his nephew, Stacy Burns, to be a reserve officer. At the time Bryan County hired him to be a law enforcement officer, Burns had a lengthy criminal record of arrests and convictions: Assault (two counts), Resisting Arrest, Public Drunkenness, Driving While

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[1] "Undisputed," that is, until now. For the first time in any court, Petitioner now claims that Sheriff Moore was not its "final" policymaker. (P. Br., 19). Pretrial, the County stipulated that "[a]t all times relevant hereto, Defendant [Sheriff] Moore was the policymaker for Bryan County regarding the Sheriff's Department," J.A. 30, and additionally took the position that its Board of County Commissioners "did not participate in any policy decisions with regard to the conduct and operation of the office of the Bryan County Sheriff." J.A. 32. The Joint Pre-Trial Order lists 61 contested issues of fact and 8 contested issues of law, but the Sheriff's policymaking authority was not among them. R. 3/856-63. (partially reproduced at J.A. 31-32). In Bryan County's opening statement, it stated, "We agree that the Sheriff made the policy insofar as the Sheriff's Department was concerned." Tr. 24. The Sheriff's testimony also acknowledged that he was the decisionmaker for the County regarding the Sheriff's Department. J.A. 114. Moreover, the County made no objection to the portion of the jury charge that stated, "Sheriff B.J. Moore is an official whose acts constitute final, official policy of Bryan County, Oklahoma." J.A. 122. The County never raised the issue on appeal and the Fifth Circuit noted that it had been waived. *Brown v. Bryan County*, 67 F.3d at 1182 n.17. Neither did Bryan County raise this dead issue in its Petition for Writ of Certiorari.

Intoxicated, False Identification, Driving While License Suspended, and nine moving traffic violations. J.A. 40-43, 88-91. Sheriff Moore was aware of Burns' lengthy criminal history. J.A. 45-46, 111, 114-15. Nevertheless, when Sheriff Moore acquired Burns' rap sheet, he did not read it carefully. J.A. 114-15. Moore admitted on cross-examination that he did not notice the assault conviction, did not notice the resisting arrest, did not notice the public drunkenness, and did not notice the false identification. J.A. 115. While being pressed about his alleged failure to notice these crimes, Moore excused his inattention with the explanation: "He had a long record." J.A. 115.[2] Sheriff Moore admittedly made no further inquiry into the disposition of any of the charges or convictions, and made no attempt to determine whether Burns was currently on probation. J.A. 115-16. If he had, he would have discovered that there was an outstanding warrant for Burns' arrest for violating conditions of probation. J.A. 41-43, 102-03. Burns not only failed to pay fines and failed to perform community service, he also violated his probation by continuing to commit crimes including the assault, the public drunkenness, the driving while license suspended, and the false identification. J.A. 42-43. Despite Sheriff Moore's awareness that Burns had a long criminal record, despite the absence of a background investigation which would have shed additional light on Burns' character, and despite Moore's knowledge that Burns would be making forcible arrests prior to receiving any meaningful training, Moore made the decision to hire Burns, and did so pursuant to his status as the decisionmaker for Bryan County. J.A. 114.

Plaintiff's law enforcement expert, Dr. Otto Schweizer, a professor of criminal justice and police administration at The

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[2] Of course, as the Fifth Circuit noted, it is possible that the jury did not believe Sheriff Moore when he professed ignorance of some of the more serious details of his nephew's record. 67 F.3d at 1184. Indeed, Moore also testified that he did not consider a history of misdemeanor arrests and convictions to be a "criminal record," J.A. 115, explaining that he did not believe that "assault and battery would stop anybody from being a good police officer. . . . " J.A. 111.

University of Central Oklahoma and a veteran of 20 years in law enforcement, several years as a field training officer and several more as a police chief, Tr. 297-302, testified to Burns' unfitness for police work. According to Dr. Schweizer, Burns was unfit to be a police officer because of excessive convictions and an arrest record that showed a blatant disregard for the law, and a potential for "abusing the public or using excessive force." Tr. 316. Even Defendants' own expert repeatedly expressed "concern" about Burns' fitness and conceded that it was doubtful that he would have hired Burns. J.A. 78-84. In the face of this damaging testimony, Bryan County clung desperately to its position that state law minimum requirements did not absolutely disqualify Burns. J.A. 49-50.[3]

Stacy Burns testified that, prior to beginning work as a reserve officer, he had no experience as a law enforcement officer. J.A. 94. Despite that lack of experience, and his criminal history, Bryan County Sheriff's Department provided no formal departmental training to Burns. J.A. 93-94. Indeed, the County had no formal training program at all. J.A. 47, 93-94, 116-17; Tr. 327-31.[4] Bryan County's reliance on the training Burns allegedly received at Oklahoma's state training program (known as CLEET) is wholly disingenuous. Burns did not even apply for classes until May 6, 1991, a scant 6 days prior to his use of excessive force against Jill Brown. J.A. 74-75. Because the classes were held only three days a

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[3] Sheriff Moore's assertion at trial that he received Burns' lengthy record but did not fully read it demonstrates how disingenuous it is for Petitioner to argue that Sheriff Moore was relying on state law minimums that absolutely disqualified only felons. How could Sheriff Moore "rely" on the fact that Burns was not a felon if Moore did not even bother to read the whole record?

[4] Although Burns stated in his deposition that he had received no training at all through Bryan County, formal or otherwise, he did assert at trial that he had viewed one or more television programs broadcast on a state law enforcement training channel. Tr. 579, 601. Burns also testified that he had ridden with his grandfather, Reserve Deputy Calclazier, "several" times in civilian clothes prior to being hired. Tr. 579.

week, Tr. 578. Burns had at most three sessions of CLEET training prior to injuring Jill Brown.[5] Burns' general lack of training was also reflected in the absence of any specific instruction regarding situations likely to arise while conducting a "state line" road block. To wit, Burns received no training regarding roadblock procedures, J.A. 94; Tr. 605, 679-680, no training regarding pursuit across state lines, J.A. 94, and no training regarding his authority to arrest in Texas. J.A. 95. Moreover, he received no supervision during the incident involving Jill Brown, J.A. 95-96, and no instructions during the pursuit. Tr. 609. Despite this absence of training, experience, and supervision, Sheriff Moore authorized Burns to make forcible arrests. J.A. 96. Burns apparently enjoyed this authority since, of his first thirteen arrests, he forced the arrestee to the ground at least *five* times, Tr. 628, a record of force that law enforcement expert Schweizer characterized as "unusually high and excessive." Tr. 394.

Although not basically relevant to the municipal liability issues raised in its brief, Bryan County includes in its fact statement a lengthy one-sided description of the events on May 12, 1991, apparently to suggest that Officer Burns did not *really* subject Jill Brown to excessive force. But Bryan County's version of the events immediately preceding and during the traffic stop in which Jill Brown was injured was hotly disputed at trial; and, as the Fifth Circuit ruled, there was plenty of evidentiary support for the jury's decision to believe plaintiff's version of the events. 67 F.3d 1174, 1178-81. What was *not* in dispute is that Todd Brown saw a

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[5] Indeed, there was evidence introduced on which the jury could have based a finding that Burns had not attended *any* CLEET classes prior to his attack on Jill Brown. After claiming in his deposition that he had received several months of CLEET training prior to May 12, 1991 (the Jill Brown incident), Burns suffered a memory loss at trial (regarding the number of CLEET classes he had attended) after plaintiff established that he had not even applied for CLEET training until May 6, 1991. Tr. 516, 577, 600, 608. Moreover, the jury was familiar with Burns' record, which revealed a disregard both for the law and for truthfulness (the false identification); and he also admitted lying during his deposition. J.A. 91.

roadblock in Oklahoma shortly after crossing the Texas state line, turned around and drove back into Texas, and was stopped by Bryan County officers shortly thereafter on a side road that led to his mother's house. On about every other fact issue there was conflicting testimony – both as to what occurred prior to the traffic stop,[6] and what occurred after the stop. Jill Brown testified that, after the stop, she heard two commands to get out of the vehicle, was doing exactly what Burns told her to do, and was not slow to respond. Tr. 53-54, 94. After starting to exit the vehicle with her hands in the air, Burns grabbed her by the left arm, spun her around, and "threw" her to the ground. Tr. 52-53.[7] She was not able to break her fall as one hand was in the air and Burns had hold of the other. Tr. 53. Ms. Brown landed on the pavement, knees first, with Burns' knees in her back. Tr. 54-55. She testified that, prior to being thrown to the ground, she was not slow to respond to any commands, did not reach for anything, or do anything that would lead Burns to believe she was reaching

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[6] Mr. Brown testified that he was familiar with the checkpoint, and chose not to go through it because he had been unnecessarily detained there on prior occasions for up to fifteen minutes. Tr. 134. (Indeed, Jill Brown and her husband had previously complained to Oklahoma officials about these roadblocks near the Texas border, complaining about unnecessary delays and being hassled by the deputies. Tr. 41-42, 134.). Mr. Brown decided to turn around and spend the night at his mother's home, which was a few miles back across the border in Texas. Tr. 134, 138. When turning around, his tires did not squeal and did not throw any gravel. Tr. 135. He neither turned around, nor came out of the turn, nor drove back toward Texas, at a high rate of speed. Tr. 136-37. After crossing the dam into Texas, he turned off the main road, taking his normal route to his mother's house. Tr. 138-39. After he realized the police were following him, he pulled off the road at the first available safe opportunity. Tr. 142-43.

[7] Petitioner characterized this as the "lowest level of force" available. (P. Br., 7). That description, however, referred to a *properly executed* arm-bar takedown, not spinning someone around and throwing them hard to the pavement. Tr. 392, 541. Moreover, there was no need to use *any* degree of force on Jill Brown. Tr. 347-48.

for anything. Tr. 54-55. (Given Burns' lengthy criminal record, which revealed a disturbing disregard for the law, and given that Burns admitted previously lying under oath, J.A. 91, it is hardly surprising that the jury rejected his version of the events.)[8] The Fifth Circuit found sufficient evidence to support the jury's finding that Burns used excessive force. 67 F.3d at 1180.[9] As a result of Stacy Burns' actions, Jill Brown has had four operations, two on each knee, and will require additional surgery, eventually culminating in total knee replacements. Tr. 261, 267-72.

At trial, Jill Brown established the three elements necessary to demonstrate that Bryan County was sufficiently at fault for its employee's constitutional tort to justify the imposition of § 1983 *municipal* liability: 1) a municipal "policy," pursued with 2) deliberate indifference, which 3) proximately caused the constitutional deprivation. First, Bryan County conceded that Sheriff Moore was the County's official policymaker with exclusive and final policymaking authority regarding the hiring and training of county law enforcement officers including Officer Burns. J.A. 30, 32. Second, the jury's verdict expressly found that the County, through its policymaker on matters of hiring and training, was deliberately indifferent to Jill Brown's constitutional rights, both with respect to the improper hiring and inadequate training of Burns. J.A. 135. Third, the jury found that Jill Brown's

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[8] When Jill Brown cried out upon being thrown to the pavement, Todd Brown attempted to check on his wife's condition and was repeatedly punched. While being beaten, Mr. Brown says he exclaimed, "This is just like L.A., huh, boys," to which Burns responded, "No, this is a hell of a lot worse." Tr. 150. Burns later returned to where Jill Brown lay on the pavement, arms handcuffed behind her back, and jerked her up by the chain between the cuffs. Tr. 57.

[9] The Fifth Circuit also found sufficient evidence to support the jury's finding of false arrest and false imprisonment. 67 F.3d at 1180-81. Jill Brown had committed no crime, yet, after being slammed to the pavement, she remained handcuffed there for approximately one hour, during which time she was never informed why she was being detained. *Id.* And no charges were ever brought against her. *Id.* at 1181.

injuries (from the excessive force) were proximately caused by the deliberate indifference of Bryan County's official policymaker. *Id.* The Fifth Circuit affirmed the jury's verdict of municipal liability, finding that the jury's verdict was supported by the evidence. *Brown v. Bryan County*, 67 F.3d 1174, 1185 (5th Cir. 1995). The Fifth Circuit's affirmance was properly deferential to the jury's resolution of conflicting evidence, and its analysis was, accordingly, very fact-intensive. *Id.* at 1178-85. Contrary to Petitioner's assertions, the Fifth Circuit never created absolute federal minimums for a state's employment of law enforcement officers. *See id.* A fair reading of the Fifth Circuit's opinion reveals that it held only that, based on the particularly egregious evidence presented in this case, the jury could reasonably find that Bryan County's policymaker acted with deliberate indifference when hiring Burns, *id.* at 1183-85, and that such deliberate indifference directly caused the constitutional deprivations (excessive force, unlawful arrest) suffered by Jill Brown. *Id.* at 1185.[10]

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[10] Bryan County did not raise a challenge in its Petition for Writ of Certiorari to the inadequate *training* portion of Jill Brown's verdict, which the Fifth Circuit left undisturbed and undiscussed, stating early in its opinion, "[f]or efficiency's sake, we will address only those points that we believe merit review." 67 F.3d at 1178. (Petitioner's reliance on a withdrawn opinion that had initially reversed the training verdict is extraordinary; and common sense would, in any event, suggest that the opinion was withdrawn precisely because the court thought its training reversal was erroneous.) Analysis of Jill Brown's "bad training" claim simply requires a straightforward application of *Canton*. *Canton* expressly envisioned that deliberate indifference could be established based on a failure to train a particular officer. 489 U.S. at 390-91. (In any event, Plaintiff established at trial that Bryan County had *no* departmental training program. J.A. 47, 93-94, 116-17; Tr. 327-31.) Additionally, *Canton* emphasized that municipal deliberate indifference does not depend on multiple incidents of constitutional deprivations when the training inadequacy relates to those recurring constitutional obligations (such as avoiding excessive force) that police officers are certain to confront. 489 U.S. at 390 n.10; *see also* 489 U.S. at 396 (O'Connor., J., concurring in part). Therefore, regardless of what this Court does with the "bad hiring"

SUMMARY OF ARGUMENT

Section 1983's language, by addressing persons acting "under color of [state] law," expressly forecloses a municipal "defense" to liability based on municipal compliance with state law. Indeed, one of the primary aims of § 1983 was to provide a remedy when state law was inadequate to protect federal constitutional rights. Bryan County's view, if accepted, would permit states to insulate their governmental subdivisions from § 1983 liability by passing easy-to-meet minimum requirements covering all the typical duties that municipalities perform. Since those state law minimums often will not be adequate to protect federal constitutional rights, Petitioner's view would effectively "repeal" § 1983. Although this Court in *City of Canton v. Harris*, 489 U.S. 378, 392 (1989), expressed concern about "federal court second-guessing" of local training decisions, the Court alleviated those concerns by requiring plaintiffs to prove municipal "deliberate indifference," a standard of proof met by Jill Brown both with respect to her "bad hiring" and "bad training" claims. Any remaining federalism concerns implicated by this case surely are attributable to § 1983 itself rather than the particular application of § 1983 to Bryan County's official employment and training decisions regarding Officer Burns. Moreover, it is disingenuous for Bryan County to argue that Sheriff Moore was relying on state laws that absolutely disqualified only felons, since Moore admitted on the witness stand that he did not fully read Burns' lengthy criminal history. In any event, Petitioner has failed to explain how this lawsuit is a threat to facially constitutional state laws when it neither challenges nor frustrates Oklahoma's minimum qualifications to be a police officer. Unless Oklahoma state law mandates the hiring of all non-felon applicants, § 1983's application to inadequate hiring decisions surely *complements* state law. Finally, nothing in § 1983 prevented Bryan County from putting on evidence of compliance with state law, which

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claim, the "bad training" verdict must be upheld unless this Court substantially retracts its opinion in *Canton*.

it did, in an attempt to persuade the jury that it was not "deliberately indifferent." The jury in the present case, however, was more persuaded with plaintiff's specific and egregious evidence of municipal deliberate indifference, than with Bryan County's evidence of accidental bare-bones compliance with generic state law minimums. The Fifth Circuit's fact-intensive inquiry merely upheld the jury's finding of deliberate indifference and in no way crafted federal minimum hiring standards as Petitioner claims.

Municipal fault under § 1983 is established by proving: 1) an official municipal "policy," which includes an official decision by a final policymaker on a matter within the policymaker's sphere of authority; 2) that the official municipal action (or inaction) showed deliberate indifference to citizens' constitutional rights; and 3) that the municipality's deliberately indifferent official action directly caused the plaintiff's constitutional injury. *See Monell v. New York Dept. of Social Services*, 436 U.S. 658, 694 (1978); *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986); *City of Canton v. Harris*, 489 U.S. 378, 388-91 (1989). Together, these three requirements constitute the fundamental components of civil or criminal fault: 1) conduct, including an act or omission; 2) a culpable mental state; and 3) causation of the injury. The point of this Court's decisions in *Monell*, *Pembaur*, and *Canton* is to ensure that municipalities are liable for constitutional torts committed by municipal employees *only* when a § 1983 plaintiff establishes that *the municipality itself* is at fault. Thus, when a plaintiff proves official *municipal* conduct, a *municipal* culpable mental state of deliberate indifference, and *municipal* causation of the constitutional injury, it is appropriate for the municipality and not just its employee to shoulder the blame for the plaintiff's constitutional injury.

Because Jill Brown proved all three components of municipal fault, this case in no way involves an application of *respondeat superior*. First, Bryan County conceded at trial that Sheriff Moore was its exclusive official policymaker regarding matters of hiring and training police officers. This Court has ruled that a single decision by a municipal policymaker on a matter that is within his sphere of policymaking

authority is an official *municipal* action (or "policy"). *Pembaur*, 475 U.S. at 480-81. Therefore, Moore's decision to hire Burns despite a lengthy criminal record revealing lawlessness and violence, and his further decision to authorize Burns to make forcible arrests prior to receiving any meaningful training, were decisions made *by the municipality itself*. Additionally, because of the certainty that police officers will face recurring constitutional obligations regarding the use of force, the jury reasonably decided that Bryan County's decisionmaking was so inadequate as to amount to municipal deliberate indifference to citizens' constitutional rights. *See Canton*, 489 U.S. at 390 & n.10. Finally, it is difficult to conceive of a constitutional deprivation more "closely related to" Bryan County's deliberately indifferent decisionmaking than excessive force. Indeed, it was the extreme threat of precisely that constitutional injury that made the County's decisions about Burns "deliberately indifferent." In sum, Jill Brown established deliberately indifferent official municipal decisionmaking that directly caused the most natural constitutional deprivation imaginable under the circumstances. That is *municipal fault*. In no way, shape, or form, is this a case of *respondeat superior*.

Stripped of its illusory federalism and *respondeat superior* concerns, this case is revealed as nothing more than a municipal desire for a "preference" – a preference supported by neither statutory language, this Court's precedent, common law tort principles, or common sense. This preference would be unavailable to natural "persons" in § 1983 litigation, just as it is unavailable to any defendant – whether natural person, private corporation, or municipal corporation – in any other tort law context. This "preference" would require plaintiffs to establish *multiple* constitutional torts (but only when suing municipalities and only when suing under § 1983!) This "multiple torts" requirement takes two forms: 1) multiple instances of municipal deliberate indifference, and 2) multiple incidents of similar constitutional deprivations.

First, Bryan County argues that it was only at fault once – it engaged in "bad hiring" and "bad training" only with respect to Officer Burns. This argument would not only

redefine fault, but it would require an interpretation of *Monell*'s "policy" requirement that is completely cut loose from its *Monell* moorings – the rejection of *respondeat superior*. Moreover, Bryan County's "multiple fault" doctrine would require this Court to overrule *Pembaur*'s common sense view that municipal power is not just within the province of legislative bodies and not just manifested by standard rules of operation. *See* 475 U.S. at 480-81. Rather, official municipal power can be exercised by policymaking officials (like a Sheriff) and can be exercised in a case-specific fashion. *Id.* Indeed, *Canton* expressly envisioned liability based on the inadequate training of specific officers, 489 U.S. at 390-91, and Bryan County does not dispute that *Canton* should also govern "bad hiring" claims.

Second, Bryan County argues that its deliberate indifference caused constitutional deprivations on only one occasion. Such a "multiple incidents" requirement has no basis in statutory language, contradicts much of this Court's precedent, and literally would change the substantive definition of a constitutional tort. *Canton*'s "deliberate indifference" standard of municipal mental culpability already ensures that a municipality will have sufficient notice to provide it an opportunity to avoid liability. Because of *Canton*, there may be some cases where a § 1983 plaintiff needs to introduce evidence of prior similar deprivations in order to prove municipal deliberate indifference to citizens' constitutional rights. But to require proof of "multiple incidents" as a matter of *law*, even in those cases where a plaintiff can otherwise demonstrate that her constitutional injury directly resulted from deliberately indifferent official actions taken by the municipality itself, is wholly arbitrary. In those cases – where the municipality has sufficient notice to avoid the injury and, consequently, sufficient notice to be deemed "deliberately indifferent" – an unyielding "multiple incidents" requirement would free municipalities from their own municipal fault rather than shield them from *respondeat superior*. And in "bad hiring" cases, it would mean that only post-employment notice is relevant; pre-employment notice would not count, no matter how clearly it portends a particular constitutional

deprivation. *Canton* has already answered this question in "bad training" cases, by recognizing that municipal fault does not depend on multiple incidents when the municipal training deficiency relates to those recurring constitutional obligations – such as avoiding excessive force – that police officers will certainly face. 489 U.S. at 390 n.10; *see also* 489 U.S. at 396 (O'Connor, J., concurring in part). If municipalities inherently are on notice of such recurring constitutional needs when *training* police officers, the same must be true when *hiring* those officers. And when Bryan County hired Officer Burns, it had notice not only of those constitutional obligations regarding the use of force that confront police officers in recurring situations, it had notice that Burns was particularly unfit to perform those obligations, at least without substantial training. This is simply not a case where proof of multiple incidents is necessary to show municipal fault.

ARGUMENT

I. IMPOSING LIABILITY DESPITE MUNICIPAL COMPLIANCE WITH STATE LAW IS EXPRESSLY AUTHORIZED BY § 1983 AND IMPLICATES NO FEDERALISM CONCERNS OTHER THAN THOSE SUBSUMED BY § 1983'S BASIC ALTERATION OF OUR FEDERAL SYSTEM.

This Court has never doubted that actions consistent with state law are within the scope of § 1983; indeed, this Court once considered whether the scope of § 1983 is *limited* to action taken consistently with state law. *See Monroe v. Pape*, 365 U.S. 167, 172 (1961). By imposing liability for federal constitutional violations caused by persons acting "under color of state law," § 1983 expressly forecloses any argument that a municipality is insulated from liability simply because its actions are authorized by, or not inconsistent with, state law. Bryan County's view stands § 1983 on its head – a citizen's federal constitutional rights would become subservient to, and revocable at the whim of, rather than protected from, persons acting under color of state law.

Viewed in light of the historical background and legislative purposes of the Civil Rights Act of 1871, Bryan County's federalism concerns are wholly illusory. As this Court recognized in *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 503 (1982), "[t]he Civil Rights Act of 1871, along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era." The Fourteenth Amendment was, of course, a direct restriction of state power, and it expressly empowered Congress "to enforce by appropriate legislation the provisions of this article." In *Ex parte Virginia*, 100 U.S. 339, 346-47, 25 L.Ed. 676 (1880), the Supreme Court observed that the power given to Congress by the Fourteenth Amendment was, necessarily, the power to enforce its prohibitions "against state action, however put forth, whether that action be executive, legislative or judicial." And because the people of the States, by amending the Constitution, so empowered Congress, laws passed in pursuance of that enforcement power constitute "no invasion of state sovereignty." *Id.* Section 1983 is just such a law: "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). In examining the legislative history of § 1983's predecessor, this Court found three main aims: 1) "it might, of course, override certain kinds of state laws"; 2) "it provided a remedy where state law was inadequate"; and 3) "it provide[d] a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Monroe*, 365 U.S. at 173-174. Indeed, opponents of the legislation voiced federalism concerns virtually identical to those voiced in Bryan County's brief: "It overrides the reserved powers of the States," and, it "absorb[s] the entire jurisdiction of the States over their local and domestic affairs." *Id.* at 174.

In essence, Bryan County's federalism concerns are more attributable to § 1983 itself than to the particular application of § 1983 to this case. Time and again, this Court has recognized the primacy of federal law in its § 1983 jurisprudence, even when doing so has authorized substantial federal

incursions into essentially state-oriented affairs. Relying on the Supremacy Clause, this Court unanimously ruled that state law immunities are not relevant in § 1983 litigation because they would frustrate the enforcement of federal law. *Howlett v. Rose*, 496 U.S. 356, 375 (1990). Additionally, although the "exhaustion of state remedies" doctrine rests primarily on federal-state comity concerns, this Court has effectively suspended that doctrine in the § 1983 context. *Monroe*, 365 U.S. at 183 (§ 1983 plaintiffs not required to exhaust state *judicial* remedies); *Patsy*, 457 U.S. at 516 (§ 1983 plaintiffs not required to exhaust state *administrative* remedies). This Court has even recognized that § 1983 authorizes federal "interference" with law suits being tried in state court. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (federal courts may enjoin state court proceedings in § 1983 actions).

Each of the aforementioned cases involved federal-state comity concerns far more significant than a federal jury finding fault with a County Sheriff's hiring decision, despite its accidental bare-bones compliance with generic state law minimums.[11] Moreover, although we agree that § 1983 does not strip states of their authority to promulgate facially constitutional legislation, Jill Brown's lawsuit neither challenges nor frustrates Oklahoma's minimum officer qualifications. Indeed, unless Oklahoma state law *mandates* that all non-felon applicants be hired, in which case even a brief interview of that "qualified" applicant would seemingly frustrate state law, § 1983's application to deliberately indifferent municipal hiring decisions provides a *complement* to state law. And that, after all, was the primary purpose of § 1983 – to provide federal protection of constitutional rights in situations where state law, either in theory or in practice, does not do the trick. *Mitchum*, 407 U.S. at 242; *Monroe*, 365 U.S. at 173-74.

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[11] Given Sheriff Moore's assertion that he did not fully read his nephew's record due to its length, J.A. 115, and given his alleged unfamiliarity with the details of that record, *id.*, it is extremely disingenuous for Petitioner to argue that Sheriff Moore hired Burns in reliance on state laws that absolutely disqualified only felons. How could he have known that the record contained no felonies?

Bryan County's view of § 1983 would effectively "repeal" it. A state could protect its governmental subdivisions from § 1983 liability simply by passing easy-to-meet minimum standards at the state level that govern all the typical activities subdivisions perform. So long as the municipality formally met state law minimum requirements – *e.g.*, hiring a police officer with a high school diploma and no felony record – the governmental subdivision effectively would be insulated from § 1983 liability. A municipality literally could ignore an applicant's assertion during an interview that, "I want to be a police officer because I enjoy physical confrontations," or "I love gun play," or "I want to rough up some minorities," so long as the candidate met the state's generic minimum requirements. Yet, from the time of § 1983's enactment until today, it has been beyond dispute that *state* law minimums do not necessarily constitute sufficient protection of *federal constitutional* rights. Indeed, § 1983 was designed to address just such disparities. *Mitchum*, 407 U.S. at 242.

Recognizing that meeting state minimums does not insulate municipalities from § 1983 liability is not to say that compliance with those minimums is wholly irrelevant to *Canton*'s "deliberate indifference" standard. Yet, nowhere does Bryan County contend that it was somehow prevented from putting on evidence of those state law requirements or arguing to the jury that meeting those requirements demonstrated the absence of "deliberate indifference." Indeed, the record indicates otherwise. (*E.g.*, J.A. 49-50, 72-73). The jury's finding of deliberate indifference, however, indicates that the jury – as was its prerogative – was more influenced by the specific evidence surrounding Officer Burns' particular unfitness for the job of police officer, than by the County's evidence that hiring Burns was not expressly precluded by generic state law minimums.

Throughout its brief, Bryan County repeatedly mischaracterizes the Fifth Circuit's opinion, and thereby mischaracterizes the nature of the issue involved in this case. *See* P. Br., p.15 (accusing the Fifth Circuit of "craft[ing] a minimum hiring standard"); p.29 (implying that the Fifth Circuit

held that Burns' misdemeanors "precluded" his employment, thereby effectively permitting federal courts to "forbid" the hiring of any applicant with a misdemeanor record); p.31 (the Fifth Circuit "substituted its own minimum hiring standards"). An honest reading of the Fifth Circuit's opinion, however, reveals that it neither crafted minimum federal hiring standards nor held that municipalities are precluded from hiring officers with a misdemeanor record. The only "standards" applied by the Fifth Circuit were this Court's settled standards for § 1983 municipal liability; and all the Fifth Circuit "held" was that the evidence presented in this particular case was sufficient for a jury to conclude that Sheriff Moore's decision to hire Burns amounted to deliberate indifference to citizens' constitutional right to be free from excessive force. 67 F.3d at 1183-85. That holding is fact-specific, appropriately deferential to the jury's resolution of conflicting evidence, and in no way erects rigid federal qualifications for state officers that "forbid" or "preclude" the hiring of all officers who have committed misdemeanors.

Finally, Bryan County repeatedly cites three cases in support of its federalism argument, two of which have nothing to do with this case.[12] The third case is *City of Canton v.*

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[12] First, Bryan County relies heavily on *U.S. v. Lopez*, 115 S.Ct. 1624 (1995), surely destined to become the citation of choice for any situation where one's client simply doesn't like the implications of a federal law. The problem with applying *Lopez* to § 1983 is that *Lopez* involved a federal law passed pursuant to the Commerce Clause, *id.* at 1626, while the present case involves a federal law passed pursuant to Congress' Fourteenth Amendment power. That distinction has not gone unnoticed in recent federalism circles. *See Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). Second, Bryan County relies on *Rizzo v. Goode*, 423 U.S. 362 (1976), where the Court held that a district court erred in granting an injunctive order directing the Philadelphia Police Commissioner to draft "a comprehensive program for dealing adequately with civilian complaints" to be formulated according to the district court's detailed "guidelines" for revising police manuals and rules of procedure. *Id.* at 369. Thus, *Rizzo* involves a district court's injunctive "takeover" of the internal operations of a city police department, readily distinguishable from a jury's imposition of compensatory damages based on a finding of municipal fault.

Harris, 489 U.S. 378, 392 (1989), which is cited, at p.15, for the proposition that imposing municipal liability based on police hiring decisions would "engage the federal courts in an endless exercise of second-guessing municipal [hiring] programs." But Petitioners have completely neglected to mention how *Canton* alleviated the problem of "endless federal court second-guessing" – *by requiring § 1983 plaintiffs to demonstrate municipal deliberate indifference*. And the federal district court in the present case required plaintiff to prove deliberate indifference in support of both her "bad hiring" and "bad training" claims.

II. MUNICIPAL FAULT UNDER § 1983 CAN BE BASED ON A SINGLE OFFICIAL MUNICIPAL DECISION, MADE BY A POLICYMAKER WITHIN HIS SPHERE OF POLICYMAKING AUTHORITY, SO LONG AS THAT MUNICIPAL DECISION IS DELIBERATELY INDIFFERENT TO CITIZENS' CONSTITUTIONAL NEEDS AND DIRECTLY CAUSES THE PARTICULAR CONSTITUTIONAL DEPRIVATION PORTENDED BY THE MUNICIPALITY'S DELIBERATE INDIFFERENCE.

When a non-policymaking municipal employee, such as a police officer, deprives a citizen of her constitutional rights and incurs § 1983 liability, that liability is not automatically imputed to the municipality via a theory of *respondeat superior*. *Monell*, 436 U.S. at 691. In other words, the employee's constitutional tort does not "belong" to the municipal employer simply because of the employer-employee relationship. Instead, a § 1983 plaintiff must clearly demonstrate *municipal* fault – *i.e.*, municipal responsibility for the constitutional tort committed by its employee. According to this Court's rulings in *Monell*, *Pembaur*, and *Canton*, municipal fault requires: 1) a municipal "policy," which means an official exercise of municipal power by the municipality, including an official decision by a municipal policymaker on a matter within his final policymaking authority; 2) that the municipality's exercise of official municipal power evince, under the circumstances, a deliberate indifference to citizens'

constitutional rights; and 3) a direct causal connection between the municipality's deliberately indifferent exercise of official municipal power and its employee's deprivation of plaintiff's constitutional rights. *See Monell*, 436 U.S. at 694; *Pembaur v. Cincinnati*, 475 U.S. 469, 480 (1986); *City of Canton v. Harris*, 489 U.S. 378, 388-391 (1989).

These three requirements are hardly mystical – they merely represent the three most basic requirements of either civil or criminal fault: 1) conduct, including an act or omission; 2) culpable mental state, and 3) proximate causation of the injury. The point of this Court's decisions in *Monell* and *Canton* was to assure that those three fundamentals of fault were actually attributable to the *municipality* and not simply thrust upon it due to the unexpected tortious conduct of an employee and the legal fiction of *respondeat superior*. Thus, *Monell*'s "policy" requirement effectively requires *municipal conduct – i.e.*, an official exercise of municipal power; *Canton*'s "deliberate indifference" standard is the requisite *municipal culpable mental state*; and *Canton*'s requirement of a close causal connection between the municipality's deliberate indifference and its employee's subsequent infliction of constitutional injury assures *municipal causation*. When these three aspects of municipal fault are established – municipal conduct, municipal culpable mental state, and municipal causation of the constitutional injury – it is appropriate for the municipality, and not just its employee, to shoulder the blame for the constitutional deprivation suffered by plaintiff. This Court's § 1983 jurisprudence requires plaintiffs to jump no additional hurdles. And to impose any further requirements would not only be arbitrary in light of centuries-old principles for attribution of fault, but would require a reading of *Monell* and *Canton* that is divorced from their primary source of legitimacy – *i.e.*, ensuring that § 1983 municipal liability is not based on *respondeat superior*.

This section of the Argument (II.), by demonstrating that plaintiff met existing Supreme Court requirements for § 1983 municipal liability – municipal "policy," municipal "deliberate indifference," and municipal "causation" of the constitutional injury – will reveal a case of *municipal* fault, where the

imposition of liability is consistent with *Monell* and *Canton* and does not rest on *respondeat superior*. Then, Part III of the Argument will demonstrate that a requirement that plaintiffs, as a matter of law, always show multiple incidents involving excessive force, even in cases where municipal fault is otherwise clearly established, amounts to nothing more than an arbitrary "every cop gets one free bite" rule.

A. Municipal "Policy" – Official Action by the Municipality Itself.

It is well settled that an isolated exercise of municipal power by a policymaking official acting within his sphere of policymaking authority can constitute *municipal* action that properly gives rise to § 1983 municipal liability. *Monell*, 436 U.S. at 694; *Pembaur*, 475 U.S. at 480-81. Therefore, Bryan County's suggestion that municipal liability for faulty hiring requires the plaintiff to show a consistent or widespread practice of faulty hiring is not only illogical (as it would require her to prove the faulty hiring of officers who had nothing to do with the deprivation of her constitutional rights), but rests on a view of *Monell*'s "policy" requirement that is completely divorced from its *Monell* foundations and, consequently, a view that was expressly rejected by this Court in *Pembaur*. 475 U.S. at 480-81.

Use of the term "policy," or "official policy," as a requirement for the imposition of municipal liability under § 1983 has its origins in *Monell*'s rejection of *respondeat superior*. 436 U.S. at 690-94. As the Court recognized later in *Pembaur*, its statement of the conclusion in *Monell* "juxtaposes the policy requirement with imposing liability on the basis of *respondeat superior*." 475 U.S. at 480 n.8 (*citing Monell*, 436 U.S. at 694). "Thus, [t]he 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality." *Pembaur*, at 479 (emphasis in original). The Court's ruling in *Monell* ensured that municipal liability is restricted to action for which the municipality is actually responsible. *Id.* at 479-80. In essence, the *Monell* requirement ensures that there will be

a municipal *actus reus*, so that municipal liability may only be predicated on acts that are acts "of the municipality" – *i.e.*, "acts which the municipality has officially sanctioned or ordered." *Id.* at 480. *See also Canton*, 489 U.S. at 394 (O'Connor, J., concurring in part) (emphasizing that municipal fault comes from "*the acts or omissions of the city itself*") (emphasis in original). Thus, the municipal "policy" requirement is significant precisely because, and only because, it ensures that municipalities are subject to liability only when an official exercise of municipal power, by the municipality, causes a deprivation of constitutional rights.[13] Nōt

[13] It should be evident from the context in which the term "policy" was employed in *Monell*, as well as the Court's interpretation of "policy" in *Pembaur*, that there is nothing magical about the term "policy." That term has no basis in statutory text, and this Court has thus far avoided interpreting it in such a way that it takes on a life of its own, cut loose from its "no *respondeat superior*" moorings in *Monell*. Indeed, the closest analogy to "policy" found in the statutory text is the requirement that persons act "under color of [state] law, statute, ordinance, regulation, custom, or usage." The Court in *Monell* expressly made this analogy when it recognized that the statutory language plainly imposes liability on a government [*i.e.* "person"] that "*under color of some official policy*," causes an employee to violate another's constitutional rights. 436 U.S., at 692 (emphasis added). This suggests that *Monell* saw the term "policy" as little more than the state (or local) power or authority that a § 1983 defendant must act "under color of." Of course, this Court has interpreted the "under color of state law" requirement to be virtually synonymous with the state action requirement. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 929 (1982). But all official activity, whether performed by the municipality itself, or by its employees, is clothed in "state action." The key, then, to municipal liability under *Monell*, is *who* is acting under color of state law (the municipality itself? or, merely a municipal employee who has no authority to act *as* the municipality?), not whether that action can fit some made-up definition of "policy." In other words, it is the requirement of official action under color of state law *by the municipality itself* that avoids *respondeat superior*, and not whether that official action is an official municipal "policy," as opposed to an official municipal "act," official municipal "decision," official municipal "order," "ruling," "plan," "edict," "standard," etc. *See Monell*, at 690 ("decision") and 694 ("edicts or acts").

surprisingly, *Monell*'s municipal action requirement may take the form of a single municipal decision, made by a municipal policymaker, and tailored to a particular situation. *Pembaur*, at 480-81. The Court in *Pembaur* explained that there was no doubt that a municipality could be liable under § 1983 for a single decision by its legislative body. *Id.* at 480, *citing Owen v. City of Independence*, 445 U.S. 622 (1980); and *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). And the Court in *Monell* expressly envisioned other *non-legislative* policymaking officials "whose acts or edicts may fairly be said to represent official policy." *Monell*, 436 U.S. at 694. Thus, no matter whether municipal policymaking authority rests with legislative officials, executive officials, or judicial officials, a single decision by the policymaker(s) ultimately in charge of that area of a municipality's affairs is an action properly attributable to the municipality itself under *Monell*.

Moreover, although "official policy" often refers to formal rules that establish fixed plans of action to be taken consistently and over time, the Court in *Pembaur* recognized that a government (or a governmental policymaker) frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. 475 U.S. at 481. According to the Court, "[i]f the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood." *Id.* Where such "decisions to adopt a particular course of action" are made by those who establish municipal policy, *Monell*'s requirement of municipal fault is satisfied because "the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly." *Id.* To deny compensation to the victim of such municipal fault would, according to *Pembaur*, be contrary to the fundamental purpose of § 1983. *Id.*[14]

[14] Even the dissenters in *Pembaur* did not quibble with the majority's conclusion that a single decision by a municipal policymaker within the scope of his policymaking authority may be an act that is sufficiently an act

The prevailing *Pembaur* view of *Monell*'s "policy" requirement makes good sense. It addresses the *Monell* concern about *respondeat superior* by ensuring the presence of a *municipal* act rather than basing municipal fault solely on the conduct of non-policymaking municipal employees. It properly recognizes that governmental power is not vested solely in legislative bodies, because § 1983 protects persons from deprivations of constitutional rights taken under color of state law, "whether that action be executive, legislative, or judicial." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). By equating municipal decisions designed to control common

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of the municipality to support municipal fault. The dissent, however, essentially believed that a County Prosecutor's five-word response to a single question over the phone lacked the dignity to be "official policy." 475 U.S. at 499 (Powell, J., dissenting). Although this may have read more into *Monell*'s use of the word "policy" than intended, it is certainly true that the Prosecutor's "go in and get them" response to the Deputy Sheriffs in *Pembaur* did not involve the deliberative process that typically characterizes an official municipal act, and was far short of the deliberative process normally employed by municipal policymakers when officially acting for the municipality (indeed, acting *as* the municipality) on matters such as hiring, firing, or training.

More importantly, the dissenters emphasized that the Prosecutor's "go in and get them," although authorizing the forcible entry that was at the heart of the *Pembaur* litigation, was advice that was consistent with federal constitutional law at the time. *Id.* at 492-96. The forcible entry was unconstitutional only in light of a subsequent Supreme Court holding that was retroactively applied to the § 1983 suit in *Pembaur*. *Id.* at 492-93. It is, therefore, difficult to fault the Prosecutor's advice. But it is important to remember that *Pembaur* was decided three years before *Canton* imposed its deliberate indifference requirement. It is unquestionable that the Prosecutor's "go in and get them" was not deliberately indifferent given the legal environment in which that decision was made. Thus, any harshness in the *Pembaur* result was attributable not to the absence of an official municipal *act* (or "policy"), but rather to the absence of any municipal *culpable mental state*. The Court avoided *respondeat superior*, but arguably imposed "strict liability" (liability in the absence of a culpable mental state). An application of *Canton*'s standard of mental culpability would ameliorate that problem.

recurring situations with municipal decisions choosing a one-time course of action tailored to a particular situation, *Pembaur* did no more than recognize that legislative power is occasionally tailored, executive power frequently tailored, and judicial power virtually always tailored, to situation-specific matters. The *Pembaur* view therefore treats municipal "persons" consistently with other § 1983 "persons," not only by rejecting *respondeat superior* and making liability "personal", but by imposing liability for one-time actions so long as those actions are under color of state law and subject another to (or cause another to be subjected to) a constitutional deprivation. And that is certainly consistent with common law tort principles that impose liability for a single wrongful act that causes harm, so long as that wrongful act is attributable to the person being sued.

In the present case, Bryan County's liability was premised not merely on Officer Burns' use of excessive force, but rather on deliberately indifferent *municipal* acts that directly caused Jill Brown to be subjected to a deprivation of her constitutional right to be free from such force. Because that deprivation of constitutional rights is fairly attributable to actions taken *by the municipality itself*, this case squarely involves an "official policy" as that term was used in *Monell* and *Pembaur*.

Bryan County stipulated at trial that Sheriff Moore was the County's policymaker on matters of hiring and training police officers. J.A. 30. The County now claims, *for the first time in any court*, that it never stipulated that Sheriff Moore was its "final" policymaker. P. Br., 19. This belated attempt to raise a dead issue depends on a revisionist view of the record. Not only did the County stipulate that "[a]t all times relevant hereto, Defendant [Sheriff] Moore was the policymaker for Bryan County regarding the Sheriff's Department," J.A. 30, the County additionally took the position that its Board of County Commissioners "did not participate in any policy decisions with regard to the conduct and operation of the office of the Bryan County Sheriff." J.A. 32. Thus, Sheriff Moore was not merely *a* policymaker, but *the* policymaker on matters of hiring and training officers. Moreover, the County

made no objection to the portion of the jury charge that stated, "Sheriff B.J. Moore is an official whose acts constitute final, official policy of Bryan County, Oklahoma." J.A. 122. The Fifth Circuit correctly found that Bryan County's failure to object to that portion of the jury charge waived the issue. 67 F.3d at 1182 n.17. Bryan County never raised this dead issue in its Petition for Writ of Certiorari, and it is simply too late now to breathe life into it. Thus, Sheriff Moore's hiring and training decisions were the *decisions of the municipality itself* on which municipal fault can properly be based. He *was* the County when acting in this area of County business. And *respondeat superior* ("let the master answer") is in no way implicated by imposing municipal liability based on wrongs perpetrated *by the master himself* in areas *within the master's domain.*

Bryan County nevertheless argues that Sheriff Moore's deliberate choice to employ one bad apple cannot be a "policy" absent a decision to employ other similarly bad apples. This argument not only contradicts *Pembaur*, it undercuts *Monell*'s holding that a municipality is a "person" subject to § 1983 liability so long as there is *municipal* fault. Under Bryan County's view, a municipality would have to be at least *twice* faulty before it could be regarded as liable. A municipal policymaker, as in this case, could deliberately pin a badge on a relative with a past history of violence and disregard for the law, authorize him to make forcible arrests prior to receiving any meaningful training, and avoid liability when that officer inevitably uses excessive force, so long as the municipality's deliberate indifference was restricted to one bad apple. A school district could deliberately employ a known pedophile to be an elementary school teacher and, so long as hiring pedophiles was not customary practice, avoid responsibility for the teacher's first (but highly foreseeable) sexual assault of a child. When such deliberately indifferent municipal actions subject citizens to a constitutional deprivation (indeed, the exact deprivation one would expect given the extreme risk consciously taken), there is clearly *municipal* fault. To nevertheless let the municipality off the hook would

undercut § 1983's primary purposes – deterrence of constitutional deprivations caused by those acting under color of state law, and compensation of the injured victims of those constitutional torts. Foreseeable constitutional torts that municipalities (or their policymakers) could readily avoid would go undeterred and uncompensated. Such bizarre results go far beyond *Monell*'s rejection of *respondeat superior* and, in effect, throw the "constitutional tort baby" out with the "*respondeat superior* bath water."

Not only would Bryan County's view create an arbitrary loophole to liability for some constitutional torts demonstrably attributable to *municipal* fault, but it flies in the face of centuries-old tort principles. This Court has emphasized that § 1983 creates a species of tort liability, *Carey v. Piphus*, 435 U.S. 247, 253 (1978), and often interprets § 1983 in light of those common law tort principles that governed suits against municipal corporations at the time of § 1983's passage. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 638-643 (1980). According to a leading nineteenth century treatise, "A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or a branch of its government, empowered to act for it upon the subject to which the particular act relates. . . ." T. Shearman & A. Redfield, *Negligence*, § 120, p. 139 (1869). Thus, municipal corporations were treated much like natural individuals, and liability could be based on a "particular act." Bryan County cannot point to a single principle of tort law that would let a culpable defendant – whether a natural individual or a corporate entity – set up a defense merely by pleading, "But my culpable injurious acts were a deviation from my typical behavior." "I drove 70 mph through a school zone with children present and killed one, but I don't usually drive 70 mph through there." "Our Board, despite its knowledge that unwitting workers would be exposed to dangerously high levels of radiation, authorized the plant to remain open, but it was a one-time deal."[15]

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[15] Of course, a municipal decision to pin a badge on a lawless individual is much less a "one-time deal" than the aforementioned illustrations, because the public danger will be ongoing and indefinite. In

This Court's opinion in *Canton* expressly envisions municipal liability based on one poorly trained employee, so long as that poor training is both the result of deliberate indifference and the cause of the constitutional deprivation. 489 U.S. at 387-391. When first characterizing the issue and its resolution, the Court recognized that there are "limited circumstances" where "the city is liable *if the employee has not been adequately trained* and the constitutional wrong has been caused by that failure to train. *Id.* at 387 (emphasis added). One of those limited circumstances is present where "a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality – a 'policy' as defined by our prior cases," *id.* at 389, and that conscious choice is "deliberately indifferent" to citizens' constitutional rights. *Id.* In defining deliberate indifference, the Court explained, at 390 (emphasis added),

> it may happen that *in light of the duties assigned to specific officers or employees* the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

The Court, therefore, expressly recognized that the nature and degree of training required to avoid deliberate indifference may vary according to the particular duties of particular officers. Depending on whether the municipality is training an undercover officer, an investigator, a traffic officer, a jailer, or a new desk sergeant, meeting the need will require different types of training tailored to the officer's duties. And just as "adequate training" may vary according to

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other words, hiring a lawless individual has consequences not just on the day employment begins, but every day thereafter until employment is terminated. In any event, to require that a final policymaker's deliberate decision on an important matter within his sphere of authority must itself set down standard operating procedure, or create some ongoing condition, quite clearly overrules *Pembaur*'s common sense view of how official government power is exercised.

the specific duties of specific officers, so may it vary according to the specific characteristics of an officer. The nature and degree of training needed by a rookie cop might vary from that needed by a veteran who is simply switching duties. Even two rookie officers may have different needs depending on municipal awareness of background or personality traits (*e.g.*, hot-headedness, aggressiveness, timidity). Just like training, the adequacy of municipal decisions regarding employment status may depend on the particular officer as well as that officer's particular duties. Whether to hire, whether to terminate, whether to suspend, whether supervision is necessary and to what degree, whether a probationary period with limited duties is required, are necessarily case-specific determinations that simply exceed the reach of rigid formulas.[16]

Not only are case-specific decisions necessarily a prominent feature of a municipality's approach to hiring and training, but that is particularly true in small counties where there may be just a handful of officers, no two of which are similarly situated in terms of experience, duties, and behavior. County "policy" in such places will be exercised, virtually out of necessity, in a case-by-case fashion. Requiring anything akin to standard operating procedure in order to establish municipal fault is not only illogical given the inherent case-specific nature of many important municipal decisions, but it would effectively permit policymakers to conduct deliberately indifferent *ad hoc* experiments subjecting laboratory-rat-like citizens to the foreseeable shock of a constitutional deprivation. As long as no two experiments are the same, and each experiment is terminated after shocking its

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[16] Indeed, blind pursuit of some pre-set standard operating procedure when dealing with the myriad training and employment issues faced by municipal policymakers would inevitably result in decisionmaking that is either too general or too simplistic, and would surely constitute deliberate indifference in its own right. Thus, it is ironic that Bryan County so forcefully argued (and still argues) its adherence to state law minimum standards regarding hiring and training. This would seemingly concede the standard operating procedure that Bryan County claims is a necessary basis for municipal fault.

first victim, there can be no municipal liability under the view espoused by Bryan County.

On the other hand, liability for case-specific municipal exercises of power poses no threat of undeserved municipal liability. Municipalities are not responsible for a policymaker's decisions on matters that fall outside his policymaking authority. A Sheriff may be the "master" on matters central to law enforcement, but not the "master" regarding other exercises of discretion, such as the firing of a secretary, or budgetary decisions regarding the number of officers or the amount of sophisticated equipment the County can afford. The Sheriff's discretionary decisions on these latter matters, if truly outside the Sheriff's sphere of authority to act *as* the County, will not be attributable *to* the County. Moreover, the Sheriff's acts and omissions are not attributable to the County unless those acts or omissions reflect a conscious exercise of official municipal power. Thus, if the Sheriff decides to run a caution light at a dangerous intersection on his way to or from work, that decision is certainly not a *municipal* decision. Indeed, even when a final policymaker is unquestionably engaged in a conscious exercise of municipal power on a matter over which he is the municipality's "master," a case-specific decision will only be an adequate basis for municipal fault if the decision was deliberately indifferent under the circumstances and directly caused the constitutional deprivation. Thus, if the policymaker has done a generally adequate job (for example, in hiring or training), it will take more than an accidental or even negligent slip-up to create municipal fault. And even when there is municipal deliberate indifference, it will be exceedingly difficult to prove causation except in those rare circumstances, such as the present case, where the municipality is deliberately indifferent specifically in regard to the particular constitutional deprivation alleged.

B. Municipal Deliberate Indifference.

Canton's "deliberate indifference" standard is also a by-product of *Monell*'s rejection of *respondeat superior*. In virtually every case where a person's constitutional rights have

been violated by a municipal employee, a § 1983 plaintiff will be able to point to something that the municipality "could have done" to prevent the incident. *See Canton*, 489 U.S. at 392. If a plaintiff could recover from a municipality merely by showing that a police officer committed a constitutional tort that could have been avoided had the municipality imposed better training and supervision, such a lax standard of fault would practically resurrect the *respondeat superior* theory of liability rejected in *Monell*. *Id.* To avoid such *de facto respondeat superior*, the Court beefed up the municipal fault requirement in § 1983 "bad training" suits, holding that such claims yield municipal liability only when the municipality's failure to train reflects deliberate indifference to the constitutional rights of those persons with whom the police will come into contact. *Canton*, at 388, 392. The municipality's deliberate indifference, or the deliberate indifference of a municipal policymaker whose sphere of authority includes hiring and training certain municipal employees, ensures that shortcomings in hiring or training are sufficiently attributable to *municipal* culpability. *Id.* at 389. (Although *Canton* is a "bad training" case, its requirement that § 1983 plaintiffs prove municipal deliberate indifference in order to establish municipal fault logically applies to "bad hiring" cases.)[17] With respect to a failure to train, the Court in *Canton*

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[17] It could, however, be argued that "bad hiring" claims do not pose the same problems as "bad training" claims and, therefore, do *not* require a showing of deliberate indifference. A "bad training" claim can *always* be fashioned so as to create a direct causal connection between the alleged failure to adequately train (or adequately supervise) and the employee's deprivation of plaintiff's constitutional rights. (*E.g.*, "Your police officers did not recognize the difference between diabetic shock and drunkenness? You should have trained them specifically regarding those distinctions; therefore, the failure to do so proximately caused the deprivation of life.") It is that ease of manufacturing a direct causal connection between a municipal failure to train and an employee's subsequent deprivation that poses the threat of *de facto respondeat superior*. On the other hand, it is very difficult to fashion a bad hiring claim so as to create that direct causal connection; "but for cause" will usually be present in a bad hiring claim,

explained that its standard is met when "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* at 390. That is precisely the degree of municipal fault that the District Court required Jill Brown to prove in support of both her "bad hiring" and "bad training" theories of § 1983 municipal liability, J.A. 123; and she met those heightened proof requirements, winning the jury verdict on both theories. J.A. 135.

Bryan County's argument that *Canton* requires plaintiffs to demonstrate "to a moral certainty" that the municipal actions complained of would lead to a constitutional deprivation is very misleading. First, a "certainty" that a deprivation will occur is arguably a higher standard than "deliberate indifference" to the constitutional rights of citizens with whom the officer will come into contact.[18] Second, the discussion in which the Court talks about "moral certainty"

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but proximate cause will exist only in those rare cases, like the present one, where the municipality has pre-employment notice of some specific tendency to commit a particular deprivation, and it is that particular deprivation that occurs. (*E.g.*, note the absurdity of arguing, in the above parenthetical illustration, "You should have hired only those officers who are able to recognize the difference between diabetic shock and drunkenness.").

[18] While "deliberate indifference" is a classic statement of recklessness, "certainty" would virtually require a plaintiff to demonstrate that a municipality *intended* by its official municipal actions to cause constitutional deprivations. That would have been quite an overreaction to the *Canton* concern that "failure to train" claims, unless accompanied by proof of a culpable municipal mental state, could result in *de facto respondeat superior*.

Even if "deliberate indifference" and "moral certainty" somehow describe the same standard, the judge's instructions required the jury to find "deliberate indifference" as defined in *Canton*'s text. J.A. 123. Only if the Supreme Court was faking everybody out with its repeated references to "deliberate indifference," and hiding the real standard ("moral certainty") in a footnote, does Bryan County's argument have any weight.

reveals that the present case involves the very "certainty" the Court was talking about. *See* 489 U.S. at 390 n.10. According to the Court, because policymakers "know to a moral certainty that police officers will have to make judgments about using force, the need to train is "so obvious" that failure to do so can constitute "deliberate indifference" to citizens' constitutional rights. *Id.* Indeed, the Court used this illustration to demonstrate when a municipality has notice of the public's constitutional needs even *prior to* a pattern of constitutional deprivations. *Id.* This "moral certainty" that police will have to make judgments about the use of force in recurring situations is just as "certain" at the time municipal policymakers are hiring officers as when they are training (or not training) them. Therefore, hiring in disregard of that "moral certainty" is surely as "deliberately indifferent" to citizens' constitutional rights as a failure to train for those situations. In any event, Jill Brown proved that Bryan County's final policymaker on matters of hiring and training police officers was deliberately indifferent in *both* respects – his decision to hire Burns despite a lengthy record revealing a general disregard for law and order; and his decision to authorize Burns to make forcible arrests prior to receiving any meaningful training.

Finally, Bryan County argues that the municipality cannot be deliberately indifferent regarding its official hiring and training decisions regarding one officer. But, as previously shown, *Canton* expressly envisioned municipal liability based on the inadequate training of specific officers. Indeed, by giving examples of when the unsatisfactory training of a particular officer will *not* suffice to impose liability on a municipality, 489 U.S. at 390-91, the Court implicitly demonstrated when the unsatisfactory training (or hiring) of a particular officer *will* suffice. According to *Canton*, if a poorly trained officer accidentally or negligently slips through the cracks of a sound training program, the requisite municipal fault (deliberate indifference) is not present. *Id.* Additionally, even when more or better training of the officer would have avoided the injury, if his training was nevertheless adequate to enable him "to respond properly to the usual and recurring situations with which officers must deal," *id.* at 391, then,

once again, there is clearly no municipal deliberate indifference. And even if an officer is inadequately trained, the injury may not have been avoidable even with good training,[19] or may not be "closely related to" the training deficiency. *Id.* Not only are these illustrations cast in terms of a singular officer or employee, but they describe situations patently *unlike* the present case. By proving that Bryan County's decision to hire Burns, and its subsequent decision to authorize Burns to make forcible arrests with virtually no training, were *deliberately indifferent* to the constitutional duties faced by police officers in recurring situations, Jill Brown plainly demonstrated that Burns did not merely "accidentally or negligently" slip through the cracks of "adequate" County hiring and training decisions. The deliberate indifference, of course, shows less than "adequacy" and more than "negligence." Nor is this a case where the hiring and training was less than perfect but nevertheless adequate to enable a proper response "to the usual and recurring situations with which officers must deal." And finally, the next section (II.C.) will demonstrate that the constitutional deprivations suffered by Jill Brown were "closely related to" the identified hiring and training inadequacies. Therefore, this is precisely the type of case where *Canton* envisioned municipal liability for constitutional deprivations caused by the deliberately indifferent municipal training (or hiring) of a particular officer.

C. Municipal Causation.

To establish municipal liability, § 1983 plaintiffs must, of course, demonstrate that the constitutional deprivation suffered was *caused by* the municipality's deliberately indifferent official municipal acts or omissions. *Canton*, at 391. In explaining this causation requirement, this Court stated that the identified municipal deficiency must be "closely related to

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[19] Given the deliberately indifferent municipal decision to hire Burns, it certainly would have done Bryan County little good to argue that Burns was so prone to violence that even good training could not have avoided his use of excessive force on Jill Brown.

the injury," "actually cause" the injury, or be the "moving force behind the constitutional violation." *Id.* at 389, 391. *See also Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) ("affirmative link"). Plainly, regardless of choice of terminology, "closely related to," "moving force," and "affirmative link" are all references to the traditional tort standard of proximate cause. Because § 1983 was intended to create a species of tort liability, *Carey v. Piphus*, 435 U.S. 247, 253 (1978), this Court has emphasized that § 1983 "should be read against the background of tort liability that makes [defendants] responsible for the natural consequences of [their] actions." *Monroe v. Pape*, 365 U.S. at 187. At the time of Congress' passage of the Civil Rights Act of 1871, the practical construction of "proximate cause" by the courts was "a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue." T. Shearman & A. Redfield, *Negligence*, § 10, p.11 (2d Ed. 1870).

The present case does not present difficult causation issues. As the Fifth Circuit ruled, there was sufficient evidence in support of the jury finding that the municipal policymaker's deliberately indifferent decisions directly caused the deprivation of Jill Brown's constitutional rights. 67 F.3d at 1185. A Sheriff (the official County policymaker on matters of hiring and training police officers) decides to hire a relative with a lengthy criminal record, and admits that he neither read the record carefully ("it was real long"), nor made any further inquiry; he gives this "lawless" individual a badge, and authorizes him to make forcible arrests prior to receiving any formal departmental training or any other meaningful training. Whether this Court's description of causation in *Canton* refers to "proximate cause" or some previously unknown version of causation that would uniquely apply to municipal liability under § 1983, it is sheer torture of the English language to argue that the wrongly employed and poorly trained officer's use of excessive force against Jill Brown was somehow not "closely related to," "directly caused by," "affirmatively linked to," a "foreseeable result of", or a "natural consequence of" the policymaker's deliberately indifferent wrongs.

This is plainly a case where the County's deliberately indifferent exercises of official County power were the "moving force" of the constitutional deprivations. Indeed, the extreme risk that an applicant with a lengthy record of lawlessness will use excessive force against a citizen was precisely the risk that made the County's decision to hire him "deliberately indifferent" to the constitutional rights of those citizens with whom the officer would come into contact. This is not a case where the municipality hired an individual with a propensity toward violence who unforeseeably enforced the law in a racially discriminatory manner. Nor is this a case of employing a former member of the KKK who unforeseeably molests a juvenile detainee. Nor is this a case of employing someone with a history of sexual assaults who, upon being delegated the discretion to hire and fire, unforeseeably fires someone based on protected First Amendment activity. Rather, this is a case where the constitutional deprivation perpetrated by the municipal employee is precisely the deprivation most highly risked by the municipality's deliberate indifference.

III. PROVING MULTIPLE INCIDENTS OF EXCESSIVE POLICE FORCE IS NOT AN ELEMENT – MUCH LESS AN INDISPENSABLE ELEMENT – OF MUNICIPAL FAULT.

A victim of excessive police force who has vividly demonstrated that her constitutional injury proximately resulted from a deliberately indifferent exercise of official municipal power should not, *additionally*, have to demonstrate that other persons not party to her lawsuit have suffered similar past deprivations. Such a requirement would be wholly arbitrary, and contribute not one iota to plaintiff's demonstration of municipal fault. This is not a case where a police officer's propensity for employing excessive force came to the attention of municipal policymakers only after his first use of excessive force. In such a case, the municipality would have no "notice" of that officer's propensity until after that first incident. Consequently, there would be no municipal duty to

terminate employment, to suspend and/or rehabilitate the officer, or to provide further training and supervision tailored to the particular officer's problem. And in the absence of notice triggering such a municipal duty, the "first victim" could not successfully argue that the municipality's failure to take remedial steps was a conscious municipal decision or "policy," much less that the municipal omission was deliberately indifferent to the need, *or* that the municipal inaction was the proximate cause of the constitutional injury (given the officer's unforeseeable intervening use of excessive force).

But in a case like the present one, where the municipality had notice of the officer's character deficiency *prior to employment*, and where that character deficiency (propensity toward violence and general disregard for the law) is one that especially portends a likely use of excessive force (the classic product of a police officer's violent or lawless disregard for another's legal rights), then both the municipal obligation and the public need are obvious long before the officer unconstitutionally injures his first victim. No matter whether the municipality's "notice" comes from pre-employment behavior, post-employment off-duty behavior, or a post-employment deprivation, the municipality's obligation to take corrective measures surely must arise at the time it is put on notice. Certainly not *before*, but certainly not at some arbitrary *later* time.

A "multiple incidents" requirement is not only wholly unnecessary to establish municipal fault in cases such as Jill Brown's, it sorely lacks even the barest legal foundation. It would blatantly rewrite § 1983's express language, effect a sea-change in the substantive definition of a constitutional tort, and contradict a wealth of Supreme Court precedent.

A. The Language of § 1983 Plainly Imposes Liability for Causing a Single Deprivation.

Bryan County's suggestion that victims of constitutional torts must demonstrate multiple incidents of similar deprivations in order to recover from a municipality flies directly in the face of § 1983's plain language, and would effectively

rewrite the statute to impose different requirements for suing a municipality-"person" and suing other "persons." As previously noted, one of the purposes of *Monell*'s rejection of *respondeat superior* was to treat municipal-"persons" the same as other "persons," who must *themselves*, under color of state law, subject others (or cause others to be subjected) to a constitutional deprivation. *Monell*, 436 U.S. at 691-92. Nothing in *Monell*, and nothing in the language, purposes, or legislative history of § 1983 supports according municipality-"persons" a preferred position over other "persons" defending § 1983 suits. And it is beyond dispute that natural "persons," such as Officer Burns, need only cause a single deprivation in order to incur liability.

The legislative history of § 1983 indicates that Congress specifically intended a liberal and beneficent construction of § 1983. *Monell*, at 684.[20] Not that a liberal construction is necessary, because the language of § 1983 is plain – it authorizes recovery for a "deprivation" (singular). 42 U.S.C. § 1983. And a municipality bears fault for that singular deprivation so long as the plaintiff can establish *municipal* action (under *Monell* and *Pembaur*), *municipal* deliberate indifference (under *Canton*), and *municipal* causation (also under *Canton*). To impose any additional requirement – such

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[20] Representative Shellabarger, the first Congressman to explain the function of § 1 of the Civil Rights Act, described how the courts should interpret it:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.

Cong. Globe, 42d Cong. 1st Sess., App. 68 (1871).

as multiple incidents of similar deprivations – would engraft an artificial and extra-statutory barrier to municipal liability on top of the already imposing barriers erected in *Monell* and *Canton* to protect municipalities from undeserved liability.

The language in the controlling § 1983 municipal liability cases, like the statutory language, expressly envisions municipal liability – so long as municipal fault is established in accordance with *Monell* and *Canton* – for a single constitutional violation perpetrated by one of its employees. *See, e.g.*, *Monell*, 436 U.S. at 694 (municipality is responsible when it "inflicts *the injury*" or is "the moving force of *the constitutional violation*." (emphasis added); *Canton* at 389 ("*the constitutional violation*" and "*a constitutional deprivation*"), and at 391 (deficiency in training must "be closely related to *the ultimate injury*") (emphasis added); *Oklahoma City v. Tuttle*, 471 U.S. 808, 823 ("there must be an affirmative link between the policy and *the particular violation* alleged") and at 824 ("*the incident*," "*the constitutional deprivation*") (emphasis added).

All of the preceding references in the singular to "incident," "violation," "deprivation," and "injury" are surely not an accident. As noted previously, there may be cases where multiple incidents involving a particular deprivation are necessary to trigger the municipal notice that creates a municipal obligation to take remedial action, such that the failure to do so constitutes deliberate indifference, foreseeably resulting in a later actionable similar deprivation. And, of course, where there is no affirmative exercise of municipal power – no conscious, deliberate municipal decision to take some action or not take some action – a plaintiff's theory of liability will normally be based on a municipal "custom" of tolerating constitutional deprivations or, at least, acquiescing in a catalytic environment conducive to constitutional deprivations. Such a theory will, of course, require proof of widespread practices or multiple incidents of constitutional deprivations. Nevertheless, that *some* theories of municipal fault in *some* cases will require proof of multiple incidents hardly supports a conclusion that plaintiffs must, as a matter of law, *always* prove prior incidents of excessive force in order to establish

municipal liability.[21] Indeed, such a "multiple incidents" requirement would undermine § 1983's goal of deterring avoidable injury-producing municipal deliberate indifference, and ensure that many deserving plaintiffs go uncompensated, even when they can readily demonstrate municipal fault without pointing to "multiple incidents."

B. A Requirement That § 1983 Plaintiffs Always Prove "Multiple Incidents" Would Change the Substantive Definition of a Constitutional Tort.

This Court has often emphasized that Congress intended § 1983 to create a species of tort liability. *E.g.*, *Carey v. Piphus*, 435 U.S. 247, 253 (1978). Therefore, § 1983 should be interpreted against the background of tort liability, *Monroe v. Pape*, 365 U.S. 167, 187 (1961), and in harmony with general tort defenses. *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976). Thus, in *Owen v. City of Independence*, 445 U.S. 622, 638-643 (1980), the Court denied municipalities qualified immunity based on the good faith of their agents after determining that such a defense was unavailable at common law in damage suits against municipal corporations.

Just as the Court in *Owen* "searche[d] in vain" for mention of municipal qualified immunity, *id.* at 641, so would the Court today search in vain for a common law tort principle – whether the defendant is a natural person, a private corporation, or a municipal corporation – that requires, as a matter of

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[21] An absolute requirement of "multiple" incidents also contravenes the settled *Monell-Pembaur* doctrine that official municipal action – even if not "customary" – will support municipal fault. Quite clearly, an official municipal decision tailored to a specific matter may proximately cause a non-"customary" constitutional tort. If that official municipal action was executed with deliberate indifference and proximately caused a constitutional deprivation, there is obviously municipal fault under *Canton*. To require that the constitutional deprivation itself be "customary" would take a type of municipal fault that *Monell*, *Pembaur*, and *Canton* welcomed into § 1983's front door, and kick it out the back.

law, that plaintiffs prove prior similar defendant-caused injuries suffered by other individuals. Indeed, the primary purpose of tort law is to compensate the victim of a civil wrong for the damage suffered, at the expense of the wrongdoer. Prosser & Keeton, *Torts* § 2, p.7 (5th ed. 1984). Given that essential underlying policy of tort law, it is hardly surprising that no case or principle can be found requiring wrongly injured plaintiffs to establish additional injuries, at other times, in other places, to other persons.[22] A victim of a reckless driver may recover for her injuries without pointing to other victims of defendant's prior reckless driving incidents. A victim of an explosion caused by reckless corporate activity, such as a Board of Directors' decision to keep a plant open despite knowledge of a dangerous gas leak, need not prove that there have been other victims of other explosions caused by other gas leaks consciously ignored by other reckless Board decisions.[23] Similarly, victims of municipal deliberate indifference should not have to uncover other prior victims of municipal deliberate indifference.

The common law doctrine most resembling Bryan County's "multiple incidents" argument is the archaic "every dog gets one free bite." Of course, in the present case, Bryan County was not dealing with a police dog, but a human being who had done a sufficient amount of living to accumulate a track record (indeed, a lengthy one) of aggressive and lawless behavior. Even with dogs at common law, there was an exception to the "one-bite" rule when the owner had knowledge of a dangerous propensity unique to that particular animal. *See, e.g.*, *Rider v. White*, 65 N.Y. 54 (1875); *Van Leuven v. Lyke*, 1 N.Y. 515 (Ct. App. N.Y. 1848). And by the time Congress passed the Civil Rights Act of 1871, it was settled that acts of aggression brought to the notice of the owner need not be

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[22] It is also not surprising that plaintiffs have never been legally required to establish two *wrongs*, or a pattern, series, or standard practice of, similar wrongs. *See* II.A. of Argument.

[23] Nor could the Board successfully argue lack of notice prior to the first explosion.

precisely similar to that which was the basis of the suit; rather, it was necessary only that the facts brought to the owner's notice "should indicate a disposition to commit injuries substantially like those which form the basis of the claim against the owner." T. Shearman & A. Redfield, *Negligence*, § 190, p.231 (2d Ed. 1870).[24] Indeed, corporations that kept dogs were equally chargeable with notice of vicious propensity as an individual. *Barrett v. Malden R. Co.*, 3 Allen, 101. In the present case, the municipality had notice of the very character deficiencies (aggressive behavior, general disregard for the law) that are particularly predictive of excessive force. That notice of such character deficiencies occurred *pre*-employment gave the municipality the advantage of an option – superior to training and supervision – that would have eliminated the known public risk: "Don't give him a badge!" But even given the decision to employ him, the municipality's deliberate indifference was magnified by its failure to provide or require any meaningful training prior to setting him loose on the public authorized to make forcible arrests. It is as if an individual purchased a full grown dog, aware of its aggressive past behavior and the lack of success of prior efforts at rehabilitation, and then, instead of keeping that dog on a short leash during a probationary period involving close supervision until the successful *completion* of obedience school, set that dog loose upon the public, specifically authorizing public contact. When that dog subsequently attacks and severely

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[24] The most probable reason that a formal "one-bite" rule gave way to a less arbitrary "knowledge of propensities" view is the amount of court time spent arguing over what constituted a prior similar bite. Is biting another animal like biting a person? Is biting cows like biting sheep? *See Mason v. Keeling* (12 Modern 332) (1700) (Gould, J.). Thus, the arbitrariness of an "every 'law dog' gets one bite" rule would hardly be offset by ease of application. One can foresee municipalities creatively searching for distinctions of previous officer "bites." Is using excessive force against an uncooperative arrestee sufficiently like an unprovoked use of excessive force against a drunken, yet cooperative, driver? Is the use of excessive force in a high stress drug raid sufficiently like a use of excessive force during a white collar fraud sting operation?

injures a person, it is hardly surprising that the body of tort law – whether in this century or the last – provides no defense for the owner to claim, "But it was the only bad dog in my whole pack," or, "But it was the first bad incident since I bought him." Neither should this Court reshape the definition of § 1983's constitutional tort to give municipalities a similarly arbitrary defense.

This Court, in both *Monell* and *Owen*, relied heavily on common law in deciding to treat municipal corporations like private corporations and natural persons. *Monell*, at 687 ("by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis"); *Owen*, at 640 ("as a general rule, it was understood that a municipality's tort liability in damages was identical to that of private corporations and individuals"). Just as private corporations and natural persons have never enjoyed a "single incident" defense, neither have municipal corporations, as implicitly evidenced by a leading nineteenth century treatise: "A municipal corporation is liable to the same extent as an individual *for any act done* by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates. . . . " T. Shearman & A. Redfield, *Negligence* § 120, p.139 (1869) (emphasis added). A review of nineteenth century cases will show no dearth of municipal liability based on one-time wrongs. *See, e.g.*, *Thayer v. Boston*, 19 Pickering 511, 31 Am. Dec. 157 (Mass. 1837) (tort action against municipality based on unique injury caused by one obstruction of one passageway in front of one warehouse); *Chicago v. Robbins*, 2 Black 418, 17 L.Ed. 298 (1863) (city liable for one injury to one person who fell one time into one hole in one sidewalk).

C. This Court's Precedent Demonstrates That Proof of Prior Similar Deprivations Is Not An Absolute Requirement of § 1983 Municipal Liability.

In *City of Canton v. Harris*, this Court ruled that a municipality's failure to train represents "city policy" when

"in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." 489 U.S. at 390. In explanation of how that standard might be met, the Court contrasted a scenario of municipal inaction in light of repeated police deprivations of constitutional rights (*i.e.*, "multiple incidents") with a scenario where, even before incidents of unconstitutionality, policymakers "know to a moral certainty" that their police officers will confront certain recurring law enforcement situations, such as making forcible arrests. *Id.* at 390 n.10; *see also* 489 U.S. at 396 (O'Connor, J., concurring in part). With respect to using force, the need to train "can be said to be 'so obvious' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." 489 U.S. at 390 n.10. Thus, the Court's analysis in *Canton* effectively distinguished between a failure to train police officers to recognize some particular medical ailment and the failure to train police regarding the use of force. While notice of a need to train (in order to avoid constitutional deprivations) may be absent in the medical case prior to an incident where that medical ailment went undetected, a municipality can hardly complain that it lacked notice that police would confront situations requiring them to determine whether to use force, how much force to apply, and how to apply that force so as to avoid unnecessary infliction of serious injury.

The analysis in *Canton* clearly supports municipal liability in the present case – expressly so on the "bad training" claim, not only because it was "obvious" to the municipal policymaker that Officer Burns would be making forcible arrests, J.A. 96, but additionally because of the municipality's notice that Burns was prone to aggressive and lawless behavior. But *Canton*'s reasoning also applies to a "bad hiring" or "bad personnel decision" claim; at the time of the employment decision, municipal policymakers also have notice of those recurring situations that police officers will obviously confront, such as choices regarding the use of force. To hire

in disregard of those clear constitutional duties that police will face in recurrent situations is as "deliberately indifferent" to the rights of those citizens with whom police will come into contact as any subsequent failure to adequately train them in the exercise of those duties. And, just as *Canton* acknowledged that deliberate indifference to such obviously recurring constitutional duties may be established prior to any unconstitutional incidents in "bad training" cases, the same has to be true in "bad hiring" cases. Any distinction between the two would have some bizarre consequences. For one, such a distinction would create a preference for municipal *omission* cases (deliberately indifferent failure to train) over municipal *commission* cases (deliberately indifferent decision to employ). Secondly, such a distinction would create a preference for cases based on *indirect evidence* of deliberate indifference (based on a failure to respond to prior unconstitutional incidents) over cases based on *direct evidence* of deliberate indifference (the Sheriff's deliberate closing of his eyes to his relative-applicant's lengthy criminal history).

Although *Canton* is most closely on point, this Court has never seriously questioned the proposition that one constitutional deprivation is enough. Thus, this Court has envisioned municipal liability for a single deprivation in those cases where a municipality has directly authorized the deprivation. *See, e.g., Owen v. City of Independence*, 445 U.S. 622 (1980) (City Council's case-specific one-time discharge of one Police Chief without a hearing); *Pembaur v. Cincinnati*, 475 U.S. 469 (1986) (County policymaker's case-specific "go in and get them," resulting in one unconstitutional warrantless entry of one barred door with one axe). And while those cases involved direct municipal authorizations of constitutional deprivations, *Canton* forecloses any distinction between those municipal actions which themselves violate constitutional rights and those municipal actions that, through deliberate indifference, directly result in an employee's subsequent violation of constitutional rights. 489 U.S. at 386-87. Indeed, the language of § 1983 simply permits no distinction to be drawn between direct municipal authorization of unconstitutional activity and deliberately indifferent official municipal actions

that "subject [persons] or cause [them] to be subjected" to a constitutional deprivation.

A single deprivation has always been enough to support § 1983 recovery against natural "persons" as well. *See, e.g., Estelle v. Gamble*, 429 U.S. 97 (1976) (case-specific medical mistreatment by prison personnel of one prisoner with one back injury); *Monroe v. Pape*, 365 U.S. 167 (1961) (police officers' case-specific breaking into one family's home on one early morning occasion, making plaintiffs stand naked in one living room during one ransacking of house). Single incidents have been sufficient even in cases involving private natural "persons." *See, e.g., West v. Atkins*, 487 U.S. 42 (1988) (private doctor deliberately indifferent to one prisoner's medical needs based on mistreatment of one once-torn Achilles tendon). And any distinction between natural "persons" and municipal corporation "persons" has no basis in § 1983's statutory text, and contradicts this Court's recognition that common law at the time of § 1983's passage treated municipal corporations just like private corporations and natural persons. *Monell*, 436 U.S. at 687; *Owen*, 445 U.S. at 640.

Despite all the preceding (and overwhelming) evidence that § 1983 does not have a multiple unconstitutional incident requirement, Petitioner relies, at P. Br. 24, on a solitary phrase in *Oklahoma City v. Tuttle* taken wholly out of context. In *Tuttle*, the trial judge's instructions to the jury permitted a finding of municipal liability without any substantial proof of municipal fault. 471 U.S. at 821, 824. Those instructions required proof *only* of the constitutional deprivation (excessive force by a police officer) and permitted the jury to infer from that single incident of excessive force all the elements of municipal liability – 1) the "policy," such as a decision by a policymaker in charge of police training, 2) the "deliberate indifference" by that policymaker in choosing an inadequate course of action in training matters, and 3) the direct causal connection between the deliberately indifferent municipal decision and the municipal employee's constitutional tort. 471 U.S. at 821. If a plaintiff could recover from a municipality merely by introducing proof of an employee's constitutional violation, without more, and have a jury instructed that it

could infer each of the elements of *municipal* liability solely based on evidence of the municipal employee's constitutional tort, the efforts of the Court in *Monell* (and later in *Canton*) – to set standards for municipal liability that ensure *municipal* fault and not just municipal *employee* fault – would have been in vain. Indeed, if municipal liability could be based *solely* on proof of a single incident of excessive force perpetrated by a municipal employee, *without more* – *without* proof of any official action taken by a municipal policymaker, *without* proof of that policymaker's deliberate indifference, and *without* proof that the policymaker's deliberate indifference caused the constitutional deprivation – municipal liability would be based on *respondeat superior*, which the Court in *Monell* expressly rejected. Thus, the Court in *Tuttle* was simply ensuring the continued vitality of *Monell*; the Court in no way ruled, or even implied, that § 1983 plaintiffs must, as a matter of law, prove *multiple* incidents involving constitutional violations in order to recover from a municipality. Indeed, the Court in *Tuttle* expressly approved of municipal liability based on a single incident of unconstitutional activity, *if* proof of the single incident is accompanied by proof of the requisite fault on the part of the municipality, and proof of the causal connection between the municipal fault and the constitutional deprivation. *Tuttle*, at 824. In sum, the "single incident" phrase in *Tuttle* simply does not bear the load that Petitioner attempts to place on it. And, unlike *Tuttle*, the judge's instructions in the present case clearly did not permit the jury to infer the existence of all of the elements of municipal liability (or *any* of those elements) solely from the incident involving Burns' excessive force against Jill Brown. J.A. 122-23. Rather, Jill Brown was required to prove – and did prove – that deliberately indifferent official municipal decisions directly caused her to suffer excessive force and other constitutional deprivations at the hands of Officer Burns. That is precisely the showing of municipal fault required by *Monell* and *Canton*.

IV. IN LIGHT OF THE EXISTING BARRIERS TO ESTABLISHING MUNICIPAL FAULT UNDER § 1983, MUNICIPALITIES HARDLY NEED THE BENEFIT OF THE ARBITRARY DOCTRINE(S) AT ISSUE IN ORDER TO AVOID UNDESERVED LIABILITY.

Wrong is wrong. Unless, it is argued, the wrongdoer is a municipality. Then, according to Bryan County's view, it takes at least two wrongs to make a wrong. A municipality must be *twice* faulty, such as by hiring two known bad apples, in double deliberate indifference to citizens' constitutional rights, setting both of those bad apples loose on the public, authorizing both to make forcible arrests prior to meaningful training (a second dose of double deliberate indifference), thereby subjecting citizens to subsequent deprivations on at least two separate occasions. This proposed "one wrong is not enough" doctrine is not only contrary to those notions of fault instilled in us as preschoolers,[25] this brief has demonstrated that it is contrary to the express language of § 1983, to its underlying purposes, to long-settled tort principles of responsibility which form the backdrop of § 1983's constitutional tort, and to this Court's holdings *and* rationales in *Monell*, *Pembaur*, and *Canton*. Moreover, the proposed "one municipal constitutional tort is not enough" rule would treat municipal-"persons" differently than natural "persons," contrary to both good common sense and good legal sense, and would have other bizarre results. Bryan County's view literally would permit municipalities knowingly to put "time bombs" on our streets and in our schools, and then deny to the victims of the first post-employment explosions of those "bombs" the opportunity for § 1983 recovery from the municipality, even though the municipality might be the only possible source of compensation and even though the municipality is demonstrably at fault.

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[25] How many of us, when our parents said, "Don't," tried to do what was forbidden just once, and were punished for our efforts?

And *why*? Municipalities simply do not need this type of arbitrary barrier to § 1983 liability. The sensible barriers to undeserved municipal liability already imposed by *Monell* and *Canton* are high indeed. *Monell* ensures that municipal liability truly will be based on *municipal* fault, and not merely upon *respondeat superior*'s automatic attribution to the municipality of employee-perpetrated constitutional deprivations. 436 U.S. at 691. Although *Pembaur* recognizes that the power to act for and bind the municipality may be vested in certain individuals as well as boards, and that municipal power may be exercised in a case-specific fashion, 475 U.S. at 480-81, *Pembaur* and its progeny ensure that municipal liability may be based only on official municipal exercises of power by the official(s) whose sphere of ultimate authority includes that aspect of municipal business which is at the heart of the litigation. *Pembaur*, 475 U.S. at 481-83 (plurality); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality).[26] Furthermore, *Canton*'s deliberate indifference standard ensures that municipal fault cannot be based on a poorly trained employee who accidentally or negligently slips through the cracks of generally adequate municipal decisionmaking. 489 U.S. at 390-91. Applying that deliberate indifference standard ensures that municipalities will be no more vulnerable to undeserved liability in "bad hiring" cases than in "bad training" cases, and also alleviates any federalism concerns about federal court second-guessing of municipal training or hiring. *Id.* at 392. Finally, *Canton*'s causation requirement ensures that even a deliberately indifferent municipal exercise of official power will not create municipal

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[26] Moreover, *Praprotnik* allows municipalities to reduce the risk of liability based on deliberately indifferent exercises of municipal power by supervisory employees, even those supervisors with policymaking capacity, simply by retaining ultimate veto power in a "Board." 485 U.S. at 127 (plurality). In that way, municipalities can effectively separate and insulate the "final power" from those employees who are most likely to have the awareness of facts sufficient to give rise to the "deliberate indifference" that may directly cause a particular constitutional deprivation.

liability unless it directly results in the precise constitutional violation portended by its deliberate indifference. *Id.* at 391.

One need only spend a few days in the Federal Reporters researching the last decade of § 1983 municipal liability cases to understand just how thoroughly municipalities have already been shielded from liability. What one will find is that, about three times a decade, in any given circuit, a § 1983 plaintiff will actually win a sizable verdict (in excess of $50,000) against a municipality and survive appellate scrutiny.[27] Even in those rare plaintiff victories, the size of damage awards is rarely disastrous because punitive damages are not recoverable from the municipality. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

Given the already imposing barriers to § 1983 municipal liability, and the dearth of plaintiff victories, *Monell* is fast becoming an "attractive nuisance," holding out to constitutionally injured citizens an increasingly illusory promise of recovery from what is often the only source of adequate compensation. The door to municipal liability under § 1983 has been left open just a crack – a crack through which deserving plaintiffs who truly can show municipal fault can still squeeze. Jill Brown is such a person. To deprive her of victory would not be due to an absence of municipal fault, as this is patently not a case that depends on *respondent superior*; rather, to deprive her of the jury's verdict would require an arbitrary definition of fault previously unknown in the

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[27] This "survey" was found by pulling every case in the Federal Reporters since late 1985 (through the June 15, 1996 Shephard's Citator) that cited *Monell*. (covering from 778 F.2d through 78 F.3d) While this survey is hardly scientific, it surely produces a representative sample of cases. Fewer than 70 cases were found where plaintiffs won an "ultimate victory" (winning a jury verdict and "keeping" it) against a municipality. Several won only injunctive relief or nominal damages. Several others were remanded for a determination of damages or simply failed to note the amount won. Of the 47 cases that provided information on damages, 15 involved amounts less than $50,000, 18 involved damages from $50,000-$200,000, and only 14 involved damage awards greater than $200,000.

whole history of tort law – a view of fault that would uniquely apply to municipal corporations, and only in § 1983 cases.

But this case is not just about Jill Brown. It is about whether § 1983 provides a meaningful remedy to those who suffer constitutional injuries due to deliberate municipal selection of the lawless to be law enforcers. Denying Petitioner's arbitrary loophole to municipal liability will not only benefit those whose constitutional injuries are fairly attributable to municipal fault, it will benefit society by encouraging something more than "deliberate indifference" from those who hand out badges, and, in the long run, it will promote law enforcement itself. Due to recent publicity generated by videotapes of police beatings and audiotapes of police racism, it is hardly surprising that we are currently in an era of increasing community distrust of police. Unfortunately, this has a substantial impact on the ability of good police officers (surely the vast majority) to do their jobs safely and effectively: "The great advantage of police compliance with the law is that it helps to create an atmosphere conducive to a community respect for officers of the law that in turn serves to promote their enforcement of the law." R. Traynor, Lawbreakers, Courts, and Law-Abiders, 41 Journal of the State Bar of California 458, 478 (July-August 1966). Of course, an environment of community distrust of law enforcement, and the attendant lack of public confidence therein, was precisely the type of environment that motivated Congress to enact what is now § 1983. This Court can help to alleviate such distrust simply by rejecting Petitioner's arbitrary views of municipal liability that have nothing at all to do with true "fault," and keeping the door to § 1983 municipal liability open (just a crack) for those plaintiffs like Jill Brown who can demonstrate that municipal fault caused their constitutional injuries.

CONCLUSION

For all the foregoing reasons, the holding of the Fifth Circuit should be affirmed.

Respectfully submitted,

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